

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 21 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

In the Matter of)

Implementation of the)
Pay Telephone Reclassification)
and Compensation Provisions of)
the Telecommunications Act of 1996)
_____))

CC Docket No. 96-128

**REPLY COMMENTS OF CITIZENS UNITED FOR REHABILITATION OF ERRANTS
AND THE COALITION OF FAMILIES AND FRIENDS OF PRISONERS OF THE
AMERICAN FRIENDS SERVICE COMMITTEE**

Casey B. Anderson
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

**Counsel for Citizens United for
Rehabilitation of Errants and Friends
of Prisoners of the American Friends
Service Committee**

July 21, 1999

No. of Copies rec'd CH4
List A B C D E

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
DISCUSSION	3
Fair Compensation and Section 276	3
Cross-Subsidization	10
The Public Interest	11
CONCLUSION AND RECOMMENDATIONS	11

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of the)
Pay Telephone Reclassification)
and Compensation Provisions of)
the Telecommunications Act of 1996)

CC Docket No. 96-128

**REPLY COMMENTS OF CITIZENS UNITED FOR REHABILITATION OF ERRANTS
AND THE COALITION OF FAMILIES AND FRIENDS OF PRISONERS OF THE
AMERICAN FRIENDS SERVICE COMMITTEE**

Citizens United for Rehabilitation of Errants ("CURE") and the Coalition of Families and Friends of Prisoners of the American Friends Service Committee ("AFSC") submit these reply comments in response to the pleadings filed by the Inmate Calling Service Providers Coalition ("ICSPC") and other parties participating in the above-captioned docket.

INTRODUCTION AND SUMMARY

The Commission established this pleading cycle in order to obtain update its record on inmate pay phone services following several *ex parte* presentations by the ICSPC.^{1/} Comments were filed by Americans Friends Service Committee, AT&T Cincinnati Bell, CURE and AFSC, Gateway Technologies, ICSPC, MCI Worldcom, the RBOC/GTE/SNET Payphone Coalition, and the Utility Consumers' Action Network. Of these nine commenters, three represent

^{1/} See Common Carrier Bureau Asks Parties to Update and Refresh Record for the Inmate Payphone Proceeding, CC Docket No. 96-128, Public Notice, DA 99-841 at 1 (rel. May 6, 1999).

consumer or public interest organizations and six represent companies involved in the provision of prison pay phones and related telecommunications services.

The comments reflect a consensus – albeit not a unanimous view – on several issues. With regard to fair compensation, only the ISPC asserts that prison pay phone service providers are entitled to the creation of additional regulatory mechanisms designed to increase the already excessive charges paid by consumers, a claim based largely on a faulty analysis of Section 276 of the Telecommunications Act of 1996 (“the 1996 Act”).^{2/} No commenter disputes that recipients of collect calls from inmates are compelled to pay the highest rates charged to any other category of consumer, and CURE and AFSC believe that any regulatory action relating to prison pay phone services should be aimed at lowering prices for the recipients of these calls while introducing market-oriented reforms and encouraging competitive alternatives.

Several commenters discussed the issue of anticompetitive subsidization practices allegedly employed by the Regional Bell Operating Companies (“RBOCs”) in violation of the 1996 Act.^{3/} CURE submits that these allegations should be considered in the course of the Commission’s complaint process rather than in a general rulemaking on inmate phone rates.

CURE and AFSC renew their request for the Commission to change the focus of its inquiry to an examination of ways to improve services and lower rates for consumers rather than on an attempt to remove the few constraints governing the inmate phone charges. The Commission’s commitment to opening telecommunications markets to competition has cut costs

^{2/} 47 U.S.C. §276.

^{3/} See 47 U.S.C. §276(b)(1)(B). Any special preference or discrimination in favor of its own payphone services is also prohibited. See 47 U.S.C. § 276(a)(2).

for many services and created new opportunities for innovation.^{4/} CURE and AFSC are confident that the same pro-competitive, consumer-oriented policies that have produced dramatic benefits in other areas would yield similar results if applied to inmate pay phone services.

DISCUSSION

Fair Compensation and Section 276

The ICSPC's petition, comments and *ex parte* submissions suggest that inmate service providers are not receiving fair compensation for inmate calling services. Curiously, the five other commenters representing the interests of inmate pay phone providers from providers say fair compensation is not an issue.^{5/} With all due respect to the members of the ICSPC, the fact that AT&T, Gateway, MCI WorldCom, and other inmate phone providers can obtain what they consider "fair compensation" suggests that the inability of some other firms to recover their costs is a result of inefficiency or bad business decisions and not regulatory barriers to cost recovery.

The ICSPC correctly points out that inmate calling services differ in significant ways from pay phone services available outside of correctional facilities.^{6/} Unlike ordinary pay phone services, telecommunications services are made available to inmates under the terms of contracts

^{4/} See Federal Communications Commission's Fiscal Year 2000 Budget Estimates Before the Subcomm. on Commerce, Justice, State, and the Judiciary of the House Comm. on Appropriations, 106th Cong. (1999) (statement of William E. Kennard, Chairman, FCC) (available at <<http://www.fcc.gov/Speeches/Kennard/Statements/stwek923.html>>) (observing that the Commission's "primary role must be to continue opening markets to competitors to bring more choices at affordable prices to all Americans").

^{5/} See AT&T Comments at 1-2; Cincinnati Bell Telecommunications Services Comments at 2-3; Gateway Technologies, Inc. Comment at 3-7; MCI WorldCom, Inc. Comments at 2-3; and RBOC/GTE Payphone Coalition Comments at 1-2.

^{6/} See Inmate Calling Service Providers Coalition Comments at 5-6 ("ICSPC Comments").

between correctional facilities or systems and inmate calling service providers.^{7/} While most consumers can use dial-around services to reach their preferred carrier, competitive alternatives are not available to inmates or the recipients of their collect calls.^{8/} In assessing the reasonability of inmate calling rates and the fairness of compensation to service providers, the Commission must consider the potential for double-recovery and price-gouging inherent in a situation where consumers have no choice but to use the carrier chosen by a third party that has no interest in keeping prices in check. Bad debt and other cost factors should be evaluated, but rate caps should be put into the regulatory context of the 1996 Act, which was based on the assumption that competition would restrain rates in cases where regulatory limits were lifted.

The ICSPC selectively quotes from footnote 54 of the Payphone Notice in support of its contention that “the Commission has said it must affirmatively address the issue of compensation where a ‘government-mandated rate ... may not be high enough to be ‘fairly’ compensatory.’”^{9/} In context, the footnote says something quite different. In its entirety, the footnote reads:

Pursuant to contract between either PPOs or non-BOC LECs and presubscribed IXC, the payphone provider likely recovers the marginal cost of the 0+ calls from its payphones. PPOs, in particular, because they do not receive noncompetitive revenues to use as a basis for subsidies, would not enter into a contract that would not compensate them fairly for use of their payphone equipment. Therefore, the payphone provider is “fairly compensated” for these calls. The issue of fair compensation arises only in cases where a caller uses a PSP’s equipment to dial around the payphone’s presubscribed IXC, because the PSP does not receive any revenue to cover its marginal cost in originating the call, or

^{7/} See id. at 5. These contracts will often specifically cover all of the payphone provider’s costs, including payphone placement costs. See AT&T Comments, supra note 5, at 2.

^{8/} See Gateway Comments, supra note 5, at 4-5.

^{9/} See ICSPC Comments, supra note 6, at 11 (quoting Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Notice of Proposed Rulemaking, FCC 96-254, 11 FCC Rcd 6716, 6726 n.54 (rel. June 6, 1996) (hereinafter Payphone NPRM)).

where a government-mandated rate, such as for local coin calls, may not be high enough to be “fairly” compensatory.^{10/} (emphasis added).

When a PPO voluntarily enters a contract to provide inmate calling services, it is “fairly compensated for these calls” by definition, because a service provider “would not enter into a contract that would not compensate them fairly.” If a service provider does not think it can make money on inmate calling services under a contract with a correctional facility or system, it should not – and if it is well-managed, it will not – sign the contract. The ICSPC’s claim that inmate calling is a losing proposition is simply not credible, because inmate calling services are provided pursuant to contracts that embody voluntary agreements as to compensation.^{11/}

In fact, the Commission’s definition of fair compensation is intended to be a proxy for voluntarily negotiated compensation rates. The Commission “define[s] ‘fair compensation’ . . . as [the terms that prevail] where there is a willing seller and a willing buyer at a price agreeable to both.”^{12/} The willing seller is the service provider who submits a bid pursuant to a correctional facility’s request for proposal (RFP) under terms and conditions defined by the service provider, and the willing buyer is the facility accepting the proposal.

Footnote 54 provides two instances where the issue of fair compensation could not be set by a freely functioning market and therefore would have to be addressed by the Commission. The first is where a caller is able to dial around the presubscribed IXC. Unfortunately, inmates do

^{10/} Payphone NPRM, *supra* note 9, at 6726 n.54.

^{11/} See Gateway Comments, *supra* note 5, at 5.

^{12/} Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, FCC 96-388, 11 FCC Rcd 20541, 20568, para. 52 (rel. Sept. 20, 1996) (Payphone Order).

not have access to this competitive alternative.^{13/} The second is for local coin calls, but inmates cannot make coin calls –they are required to call collect using the prison or jail’s monopoly service provider.^{14/}

Furthermore, Section 276 should be placed in the context of its location in the 1996 Act. It is placed in Part III of Title II, the part of the Act that establishes special provisions concerning the Regional Bell Operating Companies. Its language deals with how carriers compensate each other for carrying, switching and transporting pay phone traffic, not surcharges for customers.^{15/}

This statutory context is also clear by the rules promulgated by the Commission. Subpart M of Part 64 of the Commission’s rules deals with the provision of pay phone services. The obligation to compensate a pay phone service provider is not borne by the caller, but rather by the carrier.^{16/} The procedures for pay phone compensation deal with arrangements between carriers, not consumers.^{17/} Nothing in the rules suggests that consumers should bear the brunt of “fair compensation,” and the concept of “fair compensation” is aimed at determining how to divide the money that is already collected, not at adding to the pool.

The Commission has viewed Section 276 as a pro-consumer measure that is designed to help end users of telecommunications services make choices among competing carriers free of

^{13/} CURE and AFSC would welcome the introduction of dial-around services in the inmate telecommunications market as a means of providing consumer choice. Dial-around services and other services that increase consumer choice would encourage providers to offer innovative security measures that can accommodate competitive alternatives.

^{14/} See ICSPC Comments, supra note 6, at 5.

^{15/} See 47 U.S.C. §276. See also Payphone Order, supra note 12, at 20567-68, paras. 49-52.

^{16/} See 47 C.F.R. §64.1300(a).

^{17/} See 47 C.F.R. §64.1310.

distortions resulting from unfair allocation of revenue streams, not as a mechanism to force them to pay higher rates.^{18/} It specifically forbids the double-recovery of costs.^{19/}

Unreasonable Rates and Double-Recovery

Even if the ICSPC's analysis of the meaning of "fair compensation" were correct, ICSPC's arguments would be in tension with the statutory requirement that all rates be "just and reasonable."^{20/} No party claims that the rates charged for inmate phone services are affordable, and they are, in fact, the highest rates paid for collect calls by any class of consumer.^{21/} ICSPC presents data which suggests that their members are losing money in some jurisdictions.^{22/} As MCI WorldCom points out, however, "no carrier would be willing to bid for contracts to service inmate populations" if the business were unprofitable under existing regulatory limitations.^{23/}

ICSPC has attempted to justify its already unreasonable rates and its additional surcharge proposal based on the high costs of providing services to inmate populations.^{24/} As previously

^{18/} See Payphone Order, *supra* note 12, at 20567, para. 49 (indicating that consumers should be provided with carrier information and price disclosure).

^{19/} See *id.* at 20579, para. 74.

^{20/} 47 U.S.C. §201. The Commission has held that rates for inmate telecommunications services must meet this standard. See Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, FCC 98-9, 13 FCC Rcd 6122, 6156, para. 59 (1998) (hereinafter Second Report and Order) (affirming that all rates must conform to the just and reasonable requirements of Section 201).

^{21/} See CURE Comments at 3-4; Vanessa Blum, Opening Up a Captive Market, LEGAL TIMES at 1, 7-8 (July 12, 1999) (describing the extraordinarily high rates paid by recipients of collect calls made by inmates).

^{22/} See generally Letter from Albert H. Kramer, Counsel for ICSPC, to Kris Monteith, Chief, Competitive Pricing Division, Common Carrier Bureau, FCC, Ex Parte Presentation, CC Docket No. 96-128 (June 29, 1999) (hereinafter, "ICSPC Cost Data").

^{23/} See MCI WorldCom Comments, *supra* note 5, at 2.

^{24/} See Blum, *supra* note 21, at 7.

discussed, however, these supposedly higher costs should be incorporated into the proposals submitted by inmate calling providers in response to RFPs.^{25/} As the Commission has concluded^{26/} and most commenters in the industry acknowledge,^{27/} a \$.90 surcharge would simply represent double recovery. For example, if the ICSPC's cost data is correct, a \$.90 cent surcharge would give calling providers a pre-tax profit margin of at least 27 percent in Tennessee, the state identified as imposing the greatest nominal loss on a 12-minute local inmate call.^{28/}

Bad Debt

The commenters agree that bad debt is a significant factor in driving up the cost of providing inmate phone services. The answer to bad debt, however, is certainly not a rate surcharge. High rates and frustration with service quality are primary reasons for bad debt problems in telephone service generally and inmate phone services in particular. Adding an additional \$.90 surcharge would exacerbate the problem. The best way to address bad debt is to examine inmate telecommunications services in the context of universal service policy and to open up inmate calling markets by allowing debit card calling or other billing mechanisms.^{29/}

^{25/} See Gateway Comments, supra note 5, at 4. See also infra note 5 and accompanying text.

^{26/} See Payphone Order, supra note 12, at 20579, para. 74.

^{27/} See Gateway Comments, supra note 5, at 4.

^{28/} See ICSPC Cost Data, supra, note 23 at 2-3, Exhibit 3 (calculation based on ICSPC cost data for Tennessee, the state with largest nominal loss for 12-minute local call).

^{29/} See MILTON L. MUELLER, JR., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM 172-73 (1997) (placing phonelessness into the context of public policy choices designed to promote universal service).

Costs

ICSPC submitted revenue and cost data for their members that purport to show their members are losing money on inmate calls but there are several problems with this data. Of course, as noted above, inmate calling services contracts are voluntarily negotiated through proposals developed by the service providers, so the failure to make a profit is most likely attributable to decisions to underbid in order to win contracts or to miscalculations in the process of developing bids. In addition, the cost data is too general to provide a meaningful opportunity for analysis, because it fails to break down the components of service provider costs. The companies represented by the ICSPC are not identified, so it is not clear whether the service providers who offered the cost data are representative or how they differ from competitors who filed comments indicating that cost recovery is not a problem. The Commission should not seriously entertain the ICSPC's surcharge proposal unless and until it discloses more detailed cost information and explains why its members are unable to make money while other providers -- including many that are not affiliated with an RBOC -- are turning a profit without additional regulatory assistance.

Rate Caps

In the past, the Commission has avoided adoption of strong consumer protection measures in the area of inmate phone services, choosing instead to defer to state authority in a sort of informal forbearance policy.^{30/} If the Commission abandons its general policy of avoiding intervention in the inmate calling services market, it should do so based on the three principles

^{30/} See Second Report and Order, supra note 20, at 6156, para. 59.

laid out in the forbearance provisions of the 1996 Act: ensuring just and reasonable rates and practices; protecting the consumer interest; and promoting the public interest.^{31/}

These principles plainly justify rate caps as a way to bring inmate calling prices down to just and reasonable levels, prevent price-gouging, and promote the public interest in facilitating communications between inmates and their loved ones under the legitimate limitations imposed by correctional institutions. Consequently, if the Commission decides it wants to undertake rate regulation in the field of inmate pay phone services, an interstate rate cap would be an appropriate interim step as a prelude to implementation of competitive access and choice for inmate telecommunications. An interstate cap would limit the substantial disparity in rates paid by consumers for interstate as opposed to intrastate calls, providing an effective and timely solution to the significant problem of excessive charges in the inmate calling market.^{32/}

Cross-Subsidization

While a few commenters attempted to provide specific evidence of cross-subsidization, CURE and AFSC share the RBOC Coalition's view that the Section 208 process is a more appropriate forum for dealing with these issues.^{33/} Cross-subsidization clearly violates the 1996 Act,^{34/} but CURE and AFSC are not convinced that the current rules are insufficient to provide an enforceable remedy for such violations of the Act. Consequently, its discussion in this proceeding seems to muddy the issue of excessive rates charged to consumers.

^{31/} See 47 U.S.C. §160.

^{32/} See Comments of CURE on Second Further Notice of Proposed Rulemaking, CC Docket No. 92-77 at 5-9 (July 16, 1996).

^{33/} See RBOC/GTE Payphone Coalition Comments, supra note 6, at 2-3.

^{34/} See 47 U.S.C. §276(a) (prohibiting preferential treatment by the Bell Operating Companies of its own payphone services).

ICSPC is seeking in inappropriate remedy for its potential claims under Section 276. The remedy for any anticompetitive cross-subsidization is for the Commission to order the relevant RBOC to stop its abusive pricing practices, not to shift the burden of cross-subsidies on to consumers.

The Public Interest

The Commission's pay phone service regulations are intended to promote the "benefit of the general public."^{35/} Any evaluation of the Commission's regulations should be framed within this context. The public interest in the rehabilitation of prisoners is clearly served by promoting reasonable rates for inmate telecommunications.^{36/} High rates and low service quality hinder the widespread use of this rehabilitation measure.^{37/} The public interest, therefore, would be served by driving rates down and promoting innovation in response to market forces rather than using regulatory fiat to protect a small group of firms that are having trouble making a profit.

CONCLUSION AND RECOMMENDATIONS

Rates for inmate phone services are already an unreasonable burden on the consumer. The Commission should be looking for ways to decrease these rates rather than imposing additional and excessive surcharges upon consumers. CURE and AFSC believe a policy

^{35/} 47 U.S.C. §276(b)(1).

^{36/} See UCAN Comments at 2 (providing empirical analysis of lower recidivism rates through communications with prison inmates).

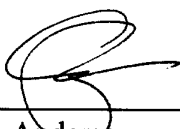
^{37/} See Joint Legislative Audit and Review Commission of the Virginia General Assembly, Review of the Department of Corrections' Inmate Telephone System, House Doc. No. 70 at 18-22, 41 (1997) (describing high rates and problems encountered by consumers receiving collect calls from inmates).

approach that lowers rates and seeks to bring the advances in telecommunications marketplace to the inmate pay phone services market will benefit consumers, result in fair treatment for all pay phone service providers and assist in the rehabilitation of inmates. The ICSPC's surcharge proposal is not consistent with this approach, and the Commission should reject it out of hand.

Respectfully submitted

**CITIZENS UNITED FOR REHABILITATION
OF ERRANTS AND FRIENDS OF
PRISONERS OF THE AMERICAN FRIENDS
SERVICE COMMITTEE**

By: _____



Casey B. Anderson
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

July 21, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1999, a true and correct copy of the foregoing **Reply Comments of Citizens United for Rehabilitation of Errants And the Coalition of Families And Friends of Prisoners of the American Friends Service**

Committee, was mailed, first-class, postage prepaid, or hand delivered to:

Albert H. Kramer, Esquire
Robert F. Aldrich, Esquire
Jacob S. Farber, Esquire
Dickstein Shapiro Morin & Oshinsky L.L.P.
2101 L Street, N.W.
Washington, DC 20037-1526
Counsel for Inmate Calling Service
Providers Coalition

Lawrence Strickling*
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
5th Floor
Washington, D.C. 20554

Peter Tenhula, Senior Legal Advisor*
Office of Commissioner Michael Powell
Federal Communications Commission
445 12th Street, S.W., Room 8-A204
Washington, D.C. 20554

Ari Fitzgerald, Legal Advisor*
Office of Commissioner William E. Kennard
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, D.C. 20554

Dan Connors, Legal Advisor*
Office of Commissioner Susan P. Ness
Federal Communications Commission
445 12th Street, S.W., Room 8-B115
Washington, D.C. 20554

Karen Gulick, Legal Advisor*
Office of Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

Paul Misener, Legal Advisor*
Office of Commissioner Harold Furchgott-Roth
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

Chief, Competitive Pricing Division*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-A225
Washington, D.C. 20554

ITS*
445 12th Street, S.W.
Washington, D.C. 20036

Glenn B. Manishin, Esquire
Elise P.W. Kiely, Esquire
Blumenfeld & Cohen
1615 M St., N.W., Suite 700
Washington, D.C. 20036
Counsel for Gateway Technologies, Inc.

Lawrence Fenster
MCI WorldCom
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20036
Counsel for MCI WorldCom

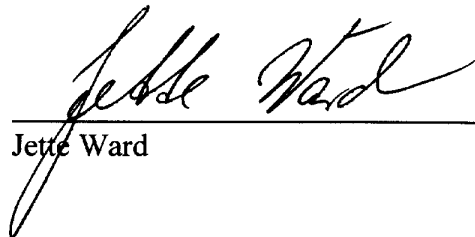
Charles Carbone, Esquire
Utility Consumers' Action Network
1717 Kettner Blvd.
Suite 105
San Diego, CA 92101

Christopher J. Wilson, Esquire
Staff Counsel
Cincinnati Bell Telephone Company
201 East Fourth Street
Cincinnati, Ohio 45202
Counsel for Cincinnati Bell Telecommunications
Services

Michael K. Kellogg, Esquire
Aaron Panner, Esquire
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
Counsel for the RBOC/GTE Coalition

Jack B. Harrison, Esquire
Frost & Jacobs LLP
201 East Fifth Street
Cincinnati, Ohio 45202
Counsel for Cincinnati Bell Telecommunications
Services

Mark C. Rosenblum, Esquire
Richard H. Rubin, Esquire
American Telgraph and Telephone
Room 3252I3
295 North Maple Avenue
Basking Ridge NJ, 07920



Jette Ward

DCDOCS: 154258.1 (3b0y01!.doc)_____

* Hand delivery